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JOHN F. DAVIS, CL

No. 1372

**In the Supreme Court of the United States**

**OCTOBER TERM, 1966**

**FEDERAL POWER COMMISSION, PETITIONER**

*v.*

**PUBLIC SERVICE COMMISSION OF THE STATE OF  
NEW YORK, ET AL.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUM-  
BIA CIRCUIT**

**THURGOOD MARSHALL,**

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The Commission adopted neither approach. It began by dividing all of the sales in question into two groups: those based upon contracts executed prior to September 28, 1960, the date that the Commission issued its Statement of General Policy No. 61-1, 24 F.P.C. 818, and those based upon contracts executed after that date. The Policy Statement, an interim measure to prevent escalation of the price of natural gas at the wellhead, announced a series of "guideline" prices for various gas-producing areas. These were prices which the Commission indicated would be acceptable to it in issuing certificates of public convenience and necessity.

The Commission determined that for sales antedating the policy statement the in-line prices were as the distributors urged, 15¢ in District No. 2 and 16¢ in District No. 3. For subsequent sales, however, it fixed a 16¢ in-line price in District No. 2 and a 17¢ in-line price in District No. 3. Chairman Swidler explained why the prices of similar sales which had previously been permanently certificated were not, in the Commission's view, the exclusive measure of in-line prices for new certificates (Sinclair J.A. 224-225):

The permanently certificated prices reflect only a part of the market activity in the post-policy period. Permanent certification is granted only where the proposed price is within the applicable guideline price, and where there is no contest by any interveners. Thus to limit the consideration to permanent certificates would permit a price freeze and would render

the hearing in this proceeding meaningless. The pre-policy price would automatically control because almost all contracts above 15.0 cents were contested.

At the time of the hearing the producers and the pipeline purchasers had experienced more than three years of doing business under the provisions of Statement of General Policy No. 61-1, and their transactions under temporarily certificated prices constituted a heavy and significant percentage of all jurisdictional sales in District No. 2. To the extent that "the price line is intended to reflect *current* conditions in the industry," *United Gas Improvement Co. v. F.P.C.*, 283 F. 2d 817, 824 (CA9), the determination of an in-line price calls for a scrutiny of all pertinent sales activity, whether under permanent or under temporary certification. See *Hassie Hunt Trust, Operator, et al.*, Opinion No. 412, 30 FPC 1438, 1442-1443 (1963). We therefore approve the Examiner's action in giving consideration to the temporarily certificated sales.

He further pointed out that, although contract prices "should not be given primary consideration," such prices "do show economic trends in the area and are entitled to some weight" (Sinclair J.A. 225).

The court of appeals, in consolidated review proceedings, sustained the Commission's determination of the 16¢ in-line price in District No. 3 for sales antedating the policy statement. (The District No. 2 determination as to such sales was unchallenged.) However, it agreed with the distributors that the Com-

mission should have confined its inquiry into appropriate in-line prices for the later period to an examination of prices at which sales had been permanently certificated, and accordingly remanded the proceedings to the Commission for a redetermination of these in-line prices. Noting that the Court of Appeals for the Tenth Circuit, in the *Sunray* case (*infra*, this page), had recently approved the Commission's approach, the court below stated, " \* \* \* we cannot accept the reasoning of the Tenth Circuit's opinion as it applies to this case." \* (Shell Pet. App. 33.)

#### REASONS FOR GRANTING THE WRIT

The Court of Appeals for the District of Columbia Circuit held in this case that the Commission, in determining the maximum initial price at which natural gas may be sold in the interstate market, may consider only prices contained in existing permanent certificates authorizing such sales; it may not consider prices contained in contracts negotiated between the producers and pipeline purchasers of natural gas, or prices authorized by the Commission on a temporary, emergency basis. This ruling is in acknowledged conflict with the rationale of the Court of Appeals for the Tenth Circuit in *Sunray DX Oil Co. v. Federal Power Commission*, 370 F. 2d 181, which upheld the Commission's in-line price—also involving sales in the Texas Gulf Coast producing areas—against the contentions accepted by the court below

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\* The court also concluded that the Commission had not adequately considered the issue of "public need" for the gas in question. We do not seek review of this latter aspect of the court's basis for remand.



in the instant case. Two distributors have filed petitions for certiorari challenging the ruling of the Tenth Circuit (*United Gas Improvement Co. v. Sunray DX Oil Co.*, No. 1134, this Term; *Brooklyn Union Gas Co. v. Federal Power Commission*, No. 1135, this Term), and we have filed a memorandum with the Court in those cases expressing our acquiescence in the granting of the petitions. For the same reasons, we urge that the Court review the judgment here as well.

We do not agree with petitioner Shell (No. 1328), however, that it is necessary to consolidate the present case with *Sunray* for briefing and argument in this Court. The Court's normal practice, where a petition raises the same issue involved in a pending case, is to defer action on the petition until the pending case is decided and then dispose of the petition summarily in conformity with its decision. We see no persuasive reason for departing from this practice in the present case—especially since this may be but the first of several additional petitions raising the *Sunray* issue that may soon be before the Court. See *Pan American Petroleum Corp. v. Federal Power Commission*, C.A. 10, Nos. 7912 *et seq.*, decided March 9, 1967 (Pet. No. 1328, App. B); *Continental Oil Co. v. Federal Power Commission*, C.A. 5, Nos. 23188 *et seq.*, awaiting decision after argument. In addition, we point out that *Sunray* involves an additional issue of importance—relating to the Commission's refund powers—not presented here.

## CONCLUSION

The petition for a writ of certiorari should be held to abide the Court's final disposition of the petitions in Nos. 1134 and 1135.

Respectfully submitted.

THURGOOD MARSHALL,  
*Solicitor General.*

RICHARD A. SOLOMON,  
*General Counsel,*

PETER H. SCHIFF,  
*Acting Solicitor,*

JOEL YOHALEM,  
*Attorney,*  
*Federal Power Commission.*

MAY 1967.

**APPENDIX**

**United States Court of Appeals for the District of  
Columbia Circuit**

**SEPTEMBER TERM, 1966**

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**No. 19796**

**PUBLIC SERVICE COMMISSION OF THE STATE OF NEW  
YORK, PETITIONER**

**v.**

**FEDERAL POWER COMMISSION, RESPONDENT**

**SKELLY OIL COMPANY, SUN OIL COMPANY, CALLERY  
PROPERTIES, INC., SHELL OIL COMPANY, PAN AMERI-  
CAN PETROLEUM CORPORATION, SUPERIOR OIL COM-  
PANY, HUMBLE OIL & REFINING COMPANY, W. S.  
KILROY, ET AL., AND KILROY PROPERTIES, INC., H. L.  
HAWKINS & H. L. HAWKINS, JR., PLACID OIL COM-  
PANY, ET AL., INTERVENORS**

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**No. 19,800**

**PUBLIC SERVICE COMMISSION OF THE STATE OF NEW  
YORK, PETITIONER**

**v.**

**FEDERAL POWER COMMISSION, RESPONDENT**

**MONSANTO COMPANY, MRS. JAMES R. DOUGHERTY, ET  
AL., W. A. STOCKARD, ET AL., EDWIN M. JONES OIL  
COMPANY, SHELL OIL COMPANY, H. D. BRUNS &  
MPS PRODUCTION COMPANY, CONTINENTAL OIL COM-  
PANY, LAMAR HUNT, INTERVENORS**

# In the Supreme Court of the United States

OCTOBER TERM, 1966

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No.

FEDERAL POWER COMMISSION, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF  
NEW YORK, ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUM-  
BIA CIRCUIT

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The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on February 7, 1967.

## OPINIONS BELOW

The opinion of the court of appeals (Shell Pet. App. A, pp. 13-43)<sup>1</sup> is not yet reported. The opinions and orders of the Federal Power Commission (Hawkins J.A. 277-308; Sinclair J.A. 215-241)<sup>2</sup> are re-

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<sup>1</sup> "Shell Pet. App." refers to the appendix to the petition for a writ of certiorari filed by Shell Oil Company in No. 1328, this Term.

<sup>2</sup> The decision below involved two Commission orders based upon separate administrative records, the revelant portions of



ported at 34 F.P.C. 897 and 930, and its opinions on rehearing (Hawkins J.A. 315-320; Sinclair J.A. 247-253) at 34 F.P.C. 1330 and 1357.

#### JURISDICTION

The judgment of the court of appeals was entered on February 7, 1967 (App., *infra*, pp. 9-11). We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

#### QUESTION PRESENTED

The Commission issued a number of permanent certificates of public convenience and necessity authorizing the sale of natural gas in the interstate market at prices it found to be "in line" within the meaning of *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 ("CATCO"). In determining the "in line" price, the Commission relied principally on prices at which similar sales had been permanently certificated. Its reliance on such prices is not challenged. But the Commission also took into consideration contract prices for similar sales and prices at which similar sales had been authorized on a temporary basis. The question presented is whether the Commission erred in giving weight to such prices.

#### STATUTE INVOLVED

The statute involved is Section 7 of the Natural Gas Act, which were reproduced in separate joint appendices. "Hawkins J.A." relates to the order issued in *H. L. Hawkins and H. L. Hawkins, Jr.*, 34 F.P.C. 897, reviewed in C.A. D.C. Nos. 19796 and 19957. "Sinclair J.A." relates to the order issued in *Sinclair Oil & Gas Co.*, 34 F.P.C. 930, reviewed in C.A. D.C. Nos. 19800, 19919, and 19941.

Act, June 21, 1938, 52 Stat. 821, 824, as amended, 15 U.S.C. 717f. The pertinent portions of Section 7 are printed at Shell Pet. 2-3.

#### STATEMENT

In two parallel proceedings under Section 7 of the Natural Gas Act, the Commission issued permanent certificates for numerous sales made by independent natural gas producers in two pricing districts (No. 2 and No. 3) in the Texas Gulf Coast area. In each of the proceedings, the principal controversy concerned the initial ("in line") price at which the gas in question could be sold, pending the establishment of just and reasonable rates under Sections 4 and 5 of the Act.

The producers urged outright acceptance of the prices specified in their contracts with the pipeline purchasers—prices that ranged as high as 20¢ per Mcf (Sinclair J.A. 54-60; Hawkins J.A. 92-98). In support, the producers offered a variety of cost evidence, all of which, however, was excluded by the two hearing examiners and by the Commission. See *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223.

A number of distributors and the Public Service Commission of New York argued for continuation of the original in-line ceilings of 15¢ per Mcf in District No. 2 and 16¢ in District No. 3, which the Commission had established on the basis of sales made prior to September 28, 1960, the date of its Statement of General Policy No. 61-1 (see p. 4, *infra*). The distributors' position was that the original in-line ceilings could not be increased.

No. 19919

LONG ISLAND LIGHTING COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

LAMAR HUNT, MRS. JAMES R. DOUGHERTY, ET AL.,  
W. A. STOCKARD, ET AL., EDWIN M. JONES OIL  
COMPANY, INTERVENORS

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No. 19941

CONTINENTAL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

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No. 19957

THE SUPERIOR OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

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[Filed Feb. 7, 1967]

On Petitions to Review Order of the Federal Power  
Commission.

Before: Bazelon, Chief Judge, Wilbur K. Miller,  
Senior Circuit Judge, and Tamm, Circuit Judge.

JUDGMENT

These cases came on to be heard on the record from  
the Federal Power Commission, and were argued by  
counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Federal Power Commission on review in these cases is set aside, and these cases are remanded to the Federal Power Commission for further proceedings consistent with the opinion of this court.

Per Chief Judge BAZELON.

Dated February 7, 1967.

Senior Circuit Judge Wilbur K. Miller dissents.